

**OPINION
45-106**

May 10, 1945 (OPINION)

GASOLINE

RE: When Exempt From Tax

I have before me your recent letter in which you submit six inquiries, all with reference to exempt gasoline purchases under Section 57-4121 of the North Dakota Revised Code of 1943.

Section 57-4121 provides as follows: "Motor fuel, except motor fuel used in the construction, reconstruction, or repair of state or county highways, may be sold in this state for agricultural or industrial purposes, without the payment of the motor fuel tax, by any dealer who is licensed to sell the same as provided in this chapter. A delivery of such tax exempt motor fuel shall be made only from a duly licensed station to a person licensed to purchase tax exempt motor fuel as provided in this chapter."

This section deals with exemptions from the motor fuel tax and you will note the following provision, "except motor fuel used in the construction, reconstruction, or repair of state or county highways, may be sold in this state for agricultural or industrial purposes, without the payment of the motor fuel tax."

Section 57-4119 provides for exemption from the payment of the motor fuel tax when any construction, reconstruction, or maintenance of any public road, highway, street, or airport is undertaken by the state or any county, city, village, township, park district, or other municipality in this state, and where public funds of the state, county, etc., are directly used for the purchasing of such motor fuel.

I assume that your inquiries have reference to private contractors and not to the state or any of its subdivisions or municipalities. I note that the fuel referred to in all six of the questions presented refers to the processing of gravel and rock to be used in highway construction and repair. Likewise the black top mix, concrete or other surfacing material for which motor fuel is used is to be used in the surfacing of highways.

Section 57-4112 excepts from the tax exemption provision motor fuel used by contractors in the construction, reconstruction or repair of state and county highways, but under Section 57-4119 this exception does not apply where the state or any of its subdivisions undertake construction, reconstruction or maintenance and pay for same directly out of state or municipal funds. It would follow, therefore, that private contractors using motor fuel for processing, as we have pointed out herein, are not entitled to tax exempt motor fuel for such purposes.

NELS G. JOHNSON
Attorney General